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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 219

ISABEL CARMEN SAURI-TYRELL, ET AL., *Petitioners*

v.

MERCEDES BERDECIA, *Respondent*

PETITION FOR REHEARING OF ORDER DENYING WRIT OF CERTIORARI TO THE SUPREME COURT OF PUERTO RICO

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Now come the petitioners and through their undersigned counsel respectfully pray this Honorable Court to reconsider its order of October 21, 1963 denying certiorari for the following reasons which were available to petitioners though not previously stated to this Court.

The petitioners respectfully urge that their constitutional rights have been denied as a result of an erroneous appli-

cation of laws by the lower courts in this case contrary to the doctrines jurisprudentially established by the Supreme Court of the Commonwealth of Puerto Rico, and by Organic Acts, Laws of Congress, Military Orders in force, all duly sustained and affirmed by the Supreme Court of Puerto Rico.

In order to make a clear and definite statement of the violation of said Laws of Congress that grant such rights that only could be classified as constitutional, we must begin with stating the origin of such rights to the citizens of Puerto Rico.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

Whereas a Treaty of Peace between the United States of America and Her Majesty the Queen Regent of Spain, in the name of her August Son, Don Alfonso XIII, was concluded and signed by their respective plenipotentiaries at Paris on the tenth day of December, 1898, the original of which Convention being in the English and Spanish languages, is word for word as follows:

The United States of America and Her Majesty the Queen Regent of Spain, in the Name of her August Son, Don Alfonso XIII, desiring to end the state of war, now existing between the two countries, have for the purpose appointed as Plenipotentiaries:

The President of the United States,

William R. Day, Cushman K. Davis, William P. Frye, George Gray, and Whitelaw Reid, citizens of the United States and for Her Majesty the Queen Regent of Spain, Don Eugenio Montero Rios, President of the Senate. . . .

Who, having assembled in Paris, and having exchanged their full powers, which were found to be in due and proper form, have after discussion of the matters before them, agreed upon the following articles:

ARTICLE I

Spain relinquishes all claim of sovereignty . . .

ARTICLE II

Spain cedes to the United States the Island of Porto Rico and other islands now under Spanish sovereignty in the West Indies, and the island of Guam in the Marianas or Ladrones.

ARTICLE III

In faith whereof, we, the respective Plenipotentiaries have signed this treaty and have hereunto affixed our seals.

Done in duplicate at Paris . . . Signature of Plenipotentiaries following and closing the treaty . . .

And whereas, the said Convention has been duly ratified on both parts, and the ratification of the two Governments were exchanged in the City of Washington, on the eleventh day of April, one thousand eight hundred and ninety nine.

Now, thereof, be it known that I, William McKinley, President of the United States of America, have caused the said Convention to be made public, to the end that the same and every article and clause thereof may be observed and fulfilled with good faith by the United States and the citizens thereof.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this eleventh day of April, in the year of Our Lord one thousand eight hundred and ninety nine, and of the Independence of the United States the one hundred and twenty-third.

WILLIAM MCKINLEY

By the President

JOHN HAY
Secretary of State

From Treaty of Paris, I.P.R.A. Titles 14, pages 15, 16, and 21.

On April 12, 1900 the Congress of the United States, approved and enacted the Organic Act, or Foraker Law, c. 191 post 1, 31 Stat. 77, the first constitution for Puerto Rico, entitled "An Act temporarily to provide revenues and a civil government for Porto Rico, and for other purposes." Section 1 thereof provided the provisions of this Act shall apply to the Island of Puerto Rico and to the adjacent island and waters of the islands.

Section 8 thereof provides:

> "The laws and ordinances of Puerto Rico now in force shall continue in full force and effect, except as altered, amended, or modified hereinafter, or as altered or modified by military orders and decrees in force when this Act shall take effect, and so far as the same are not inconsistent or in conflict with the statutory laws of the United States not locally inapplicable, or the provisions thereof, amended or repealed by the legislative authority hereinafter provided for Puerto Rico or by Act of Congress of the United States."

L.P.R.A. Titles 1-4, posts 1 and 8, Organic Act, pages 23, 28, and 29, to the effect that Civil Code and the Mortgage Laws and its Regulation, were left in force by said law of Congress.

Provisions continued in force:

> "The Civil Code was continued in force by this section." *Olivieri* v. *Biaggi*, 1911, 17 P.R.R. 675

> "The Mortgage Law and its Regulations were continued in force by this section." *Gimenez* v. *Brenes*, 1906, 10 P.R.R. 124; *Muñoz* v. *District Court*, 1931, 42 P.R.R. 371.

> "Under this section, the General Orders were continued in effect." *Chevremont* v. *People of Puerto Rico*, P.R.R. 108.

> "No one of the provisions of the Mortgage Law can be repealed by implication, but must be repealed by special law, according to the provisions of this

> section, which, under section 8 of the Organic Act of 1900, declared the aforesaid law continued in force." *Gimenez v. Brenes, supra.*

The 2nd Organic Act of Puerto Rico, of March 2, 1917, c. 145, 39 Stat. 951, known as Jones Act, and entitled "An Act to provide a civil government for Puerto Rico, and for other purposes" provided in Section 1, corresponding to Section 1, of Organic Act of 1900, for its jurisdiction over Puerto Rico and adjacent islands and Section 57 corresponding to the continuance of Laws, Ordinances of Puerto Rico, as in Section 8 of the Organic Act of 1900. Finally, there was Public Law 600, 81st Congress; An Act to provide for the organization of a constitutional government by the people of Puerto Rico. Article IX, 1, corresponding to Section 8, Organic Act 1900, Section 57 Organic Act 1917, stating said Article IX, 1, (Laws, rights, liabilities, etc. continued) "When this Constitution goes into effect all laws not inconsistent therewith shall continue in full force until amended or repealed, or until they expire by their own terms." This Public Law 600 of Congress was approved by Public Law 447, 82d Congress; Joint Resolution approviding Constitution of the Commonwealth of Puerto Rico on July 3, 1952.

Civil Code of Puerto Rico, Sect. 5, Title 31, page 334 provides:

> "Repeal of Laws—Laws shall only be repealed by means of subsequent laws; and disuse, custom or practice to the contrary shall not impede their enforcement". . .

Title 30, post 777, page 902 (Article 413 Mortgage Law, in force since 1893):

> "All previous provisions regarding mortgages are hereby repealed, all other provisions in conflict with those of this subtitle are also hereby repealed. None of these sections of which this subtitle consists can be

repealed except by virtue of another special law and no budget law shall ever be considered a special law for this purpose".

"The period fixed in this subtitle shall be computed from the date on which it goes into effect." Mortgage Law, 1893, Art. 413.

JURISPRUDENCE AFFIRMING ABOVE PROVISION

"None of the provisions of the Mortgage Law can be repealed by implication, but must be repealed by special law, according to the provisions of this section, sanctioned by the Congress of the United States, which, under section 8 of the Organic Act of 1900, declared that the aforesaid law continued in force". *Brenes* v. *Gimenez*, 10 P.R.R. p. 124.

The question involved in this case which has not been previously raised is whether it can be held by a court that notation of *lis pendens* be taken and entered at the Registrar of Property, by a proceeding contrary to the dispositions of Article 42, 1, Mortgage Law, in its Regulation being Article 91, by means awarded in Section 91 of the Code of Civil Procedure, Ed. 1933 L.P.R.A. Title 32, post. 455, Chapter 59, page 757.

The Mortgage Law, Article 42, 1—Post 91, Title 30, page 699, prescribes:

PERSONS ENTITLED TO CAUTIONARY NOTICES

"The following may request the entry of cautionary notices of their respective rights in the proper public registry"

1—He who brings an action to recover the ownership of real property or the constitution, declaration, modification or extinction of any real right."

2—. . .

Corresponding in Mortgage Regulations, Post 971 Title 30-31, L.P.R.A. page 52, Art. 91.

ACTION TO RECOVER OWNERSHIP OR TO CREATE OR ESTABLISH PROPERTY RIGHTS

"The person who brings the action of ownership referred to in the first subdivision of section 91 of this title, may at the same time or later apply for a cautionary notice thereof, *offering to make indemnity for any damages* which defendant may suffer thereby if he should win the suit."

"The judge of the Court shall order the cautionary notice entered, if proper at the time of admitting the complaint; and if application should be made thereof subsequently within a term of three days." (Mortgage Reg. 1893, Art. 91)

Facing this above Congressional sanctioned proceeding, Article 91, Code of Civil Procedure, Ed. 1933, L.P.R.A. Title 32, chapter 59, page 777, provides and reads:

"In an action affecting the title or the right of possession of real property, the plaintiff, at the time of filing the complaint, and the defendant, at the time of filing his answer, when affirmative relief is claimed in such answer, or at any time afterwards, may file for record with the registrar of the district in which the property or some part thereof is situated, a notice of the pendency of the action or defense and a description of the property affected thereby. From the time of filing such notice for record only shall a purchaser or incumbrancer of the property affected thereby be deemed to have constructive notice of the pendency (of the action, and only of its pendency) against parties designated by their real names."—Code of Civil Procedure, 1933, post 91.

Now, this Article 91, amends by implication to the prejudice of the property owner, with a duly recorded title, with all the requirements and exigencies of the Civil and Mortgage Law, that any non bona fide litigant can, without offering bond, warranty or indemnity for damages sustained by said cautionary notice to property owner with a vicious and unjustified complaint, entered such cautionary notice in the Registrar.

It is to the prejudice of the property owner because said Article 91 relieves the plaintiff from taking any heed in causing damages with a tortious proceeding against defendant property owner, while by the provisions of Mortgage Law and its Regulations, he is obliged thereof with said cautionary notice, "to offer to make indemnity for any damage which defendant may suffer thereby" in case that defendant should win the suit.

Said limitations, modifications and partially repealing of the Mortgage Law, Article 42-1 and its Regulation, Article 91, by Section 91 of the Code of Civil Procedure, is contrary to law and jurisprudence and is against the sanction of Congress to said Mortgage Law and its Regulation since April 12, 1900, Organic Act, Sec. 8; March 1917, Jones Act, Section 57, and Congress Law 600, Granting a Constitution to Puerto Rico, Article IX,-1, duly sustained this thesis by the Decisions to this effect stated *supra*.

Article 91 of the Code of Civil Procedure by its repealing implication relieves plaintiff from his fair, equitable and legal obligation to offer indemnity to the defendant if said complaint is not just. Allow us to call it a fishing expedition. Said unjustified relief is to the prejudice of one who having gone through all honest dealings in acquiring a property; having it recorded to his safety, in the Registrar according to law, has to undergo a claim with no hope of lifting such cautionary notice until the case comes to an end; deprived of his property without even having the means to be indemnified by a tortious litigant; having to stand and undergo the freezing of its property, deprived in its right to enjoy it freely and, perhaps, to yield to a bastardy to take out of his patrimony the wall of separation from the honest marketing possibility. It is clear that such proceedings cannot even by implication, repeal, modify, limit or in any way create rights against the provisions of Article 42-1 Mortgage Law and its Regulations, and violating this law, causing a proceeding contrary to the proceedings acknowledged by statute laws sanctioned

by the Congress of the United States, and said violation, and sentences granting such spurious rights can be and are the subject of a review under the jurisdiction of the Supreme Court of the United States, on behalf of public policy, as created by the enforcement of Congressional Laws and Decrees. There is no special law repealing the *lis pendens* proceedings acknowledged by the Mortgage Law; then any provision with a repealing character that is not a special law to the effect of repealing any of its provisions, is void, null and of no legal value, and ought not be followed in court issues by sentences or decrees of courts to its validity.

From American Jurisprudence, Vol. 34, Lis Pendens, Sect. 7, page 366:

> "Operation of Statutes.—Since the doctrine of lis pendens is a part of the common law, the authorities appear to agree that statutes, such as those noted in the preceding section, neither create nor abrogate it, but merely limit the operation to a certain extent."

and Sect. 6—page 366:

> "A statute requiring a formal notice of lis pendens to be recorded is not unconstitutional, since such requirement is regarded as being intended merely to provide a convenient and effectual method of enforcing the Common Law rule."

From Fourth Decennial Digest, American Digest System 1926 to 1936, Volume 6, p. 1480, Sect. 212 cites the case of C.C.A. Ark. 1928:

> "Property rights cannot be invaded by laws which, under guise of police regulations, have some ulterior purpose (Const. Amend. 14)—*Road Improvement Dist. No. 7 of Crittenden County, Ark. v. St. Louis-San Francisco R. Co.*, 28 F. 2d 825.
>
> "Enactments of Legislature under guise of police power will be set aside by courts when unwarranted

or arbitrary (Const. Amend. 14)—*Road Improvement Dist. No. 7 of Crittenden County, Ark.* v. *St. Louis-San Francisco R. Co.*, 28 F. 2d 825."

Petitioners tried to discuss this matter at the Ponce Part, Superior Court of Puerto Rico, through a motion of Demurrer for Lack of Facts, and Motion to Dismiss, addressed to the second and third causes of action, in this case docketed Civil No. TS-52-114, *Mercedes Berdecia, Plaintiff* v. *Elizabeth Tyrell Howard, et al., Defendant*, on file of said motion June 23, 1961, but that Honorable Court, Ponce Part, Superior Court of Puerto Rico, simply refused to pass upon it for the reasons stated in its resolution ordering cancellation of lis pendens, in behalf and favor of petitioners (see record, page 8), reversed by the Supreme Court of the Commonwealth of Puerto Rico. (The first cause of action is affiliation.)

The above decision in C.C.A. Ark. 1928, does clear up the situation by stating that unwarranted or arbitrarily, no law enactments can be taken or approved by legislation, as that it is the duty of courts to set aside legislation. Being constitutional, the repealing provisions of the Mortgage Law, in its peculiar way of being only repealable by special legislation to the effect, said repealing provision is binding, and its the duty of the court to sustain it and to set aside its repealing by merely implication.

Since petitioners' rights have been hindered in a way peculiarly inexplicable by the lower court's actions or resolutions, expressly contrary to law and policy in the appreciation of statutes, even Congressional Acts, and sanctioned legislation by Congressionad mandate and statutes of the Commonwealth of Puerto Rico, whose validity as such are in issue by the erroneous court decision, being such court orders and resolutions not only contrary to law, but of hindrance to the legal rights of petitioners, the seeking of relief at the doors of the Supreme Court of the United States is our belief that we have procedural and

substantive grounds to pray the Supreme Court of the United States to exercise its jurisdiction for relief and remedy to our cause.

CONCLUSION

The right to own property and to enjoy its possession is a constitutional right. The property owned by petitioners is secured to them by the above said Constitutions.

Both Federal and States Constitutions do preserve and protect and warrant such rights to property and its free enjoyment.

Owners of property, such as petitioners, by means of erroneous proceedings, orders, decrees or sentences cannot be deprived of these lawful and constitutional privileges and preogatives or by the interpretation of laws erroneously and contemptuous in their construction.

If deprivation comes on account of such laws or by their erroneous interpretation by courts, or freezing free enjoyment of such property, the Federal and State Constitutions are violated and Federal Laws to the effect are violated. The result of these violations are repugnant not only to the Federal and State Constitutions, but to the Federal and State Laws, and the progressive policy of fair play and good behavior of the citizens.

PRAYER

Wherefor, it is respectfully prayed that this Court reconsider its Order denying certiorari and that a writ of certiorari be issued to the Supreme Court of the Commonwealth of Puerto Rico in case No. C-62-21.

Respectfully submitted,

(S) Carlos D. Vazquez,
Counsel for Petitioners.
P.O. Box 1658
San Juan, Puerto Rico.

San Juan, Puerto Rico, January 16, 1964

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 219

ISABEL CARMEN SAURI TYRELL, ET AL., *Petitioners*,

v.

MERCEDES BERDECIA, *Respondent*.

Certificate

I, CARLOS D. VAZQUEZ, do hereby certify: That I am counsel for the petitioners in this case; that the petitions for review and for rehearing had been filed in this case, in good faith and without any purpose of delaying the proceedings.

San Juan, Puerto Rico, January 16, 1964.

s/ CARLOS D. VAZQUEZ
Carlos D. Vazquez
Counsel for Petitioners

I, Carlos D. Vazquez, counsel for the petitioners in this case, DO HEREBY CERTIFY;

That a true and faithful copy of this Certificate has been sent by mail to Mr. Hector Lugo Pagan, counsel for Mercedes Berdecia, to his known address: P. O. Box 205, Ponce, Puerto Rico.

San Juan, Puerto Rico, January 16, 1964.

s/ CARLOS D. VAZQUEZ
Carlos D. Vazquez
Counsel for Petitioners